

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VICKY L. SHEFFIELD,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
AT07548710543

DATE: JAN 30 1989

Paul L. Cames, Esquire, Warner Robins, Georgia,
for the appellant.

William Macauley, Esquire, Washington, D.C., for
the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board on the agency's petition for review of an initial decision that reversed its decision directing the appellant's employing agency to remove her from her position and barring her from competing for or accepting appointments in the Federal competitive service until February 28, 1989. After full consideration, the Board DENIES the agency's petition for review because it does not meet the criteria set forth at 5 C.F.R. § 1201.115. The Board REOPENS the appeal on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial

decision as MODIFIED by this Opinion and Order, still REVERSING the agency's action.

BACKGROUND

Agency's Action

The appellant was employed by the Department of the Air Force as an Aircraft Electrical Systems Mechanic. The agency proposed its action which instructed the appellant's employing agency to remove her from its rolls, and barred the appellant from competing for or accepting appointments in the competitive Federal service based on charges that: (1) The appellant falsified her work experience on her SF-171; and (2) the appellant falsified her work experience on a job element statement she submitted to obtain her position. The appellant filed a timely petition for

appeal from the agency's action to the Board's Atlanta Regional Office.

Initial Decision

In an initial decision dated September 28, 1987, the administrative judge reversed the agency's action, finding that: (1) The appellant did not falsify her experience on an August 11, 1982 application for the position of Aircraft Electrical Systems Mechanic or in her responses to the Job Element Questions concerning that position; (2) even if the charges were sustained, the agency failed to establish that the falsification was material; and (3) even though sanctions against the agency were warranted because of its repeated failure to comply with Board orders and

¹ In an Acknowledgement Order dated June 5, 1987, the appellant was informed that her petition for appeal, filed on June 2, 1987, was untimely by seven days because her appeal had not been filed within twenty-five days from the date of the agency's issuance of its final decision. The appellant was ordered to file evidence or argument showing good cause for the delay in filing the appeal or to show that the appeal was timely filed. See Appeal File, Tab 2. In response to this order, the appellant argued that her petition for appeal was timely filed. She asserted that she did not receive the decision dated April 30, 1987, until May 13, 1987, and that the agency's decision letter informed her that her employing agency was directed to remove her from the rolls on that twentieth calendar day from the date of her receipt of the decision. She argued that because the decision letter provided an effective date, she had until June 2, 1987 to file her petition for appeal. She further argued that although the agency's decision was dated April 30, 1987, it was not issued until May 13, 1987, and that she had twenty-five days from the date of issuance to file her petition for appeal. See Appeal File, Tab 3. In an order dated July 2, 1987, the administrative judge found that since the appellant was not given the agency's decision until May 13, 1987, the decision was not issued until that date. He concluded that the appellant's petition for appeal was timely filed. See Appeal File, Tab 6.

instructions, the imposition of sanctions was not necessary to serve the ends of justice. The agency has filed a timely petition for review of the initial decision and the appellant has responded in opposition to the petition.

The Agency's Petition for Review and the Appellant's Response.

In its petition for review, the agency argues that: (1) The administrative judge failed to make complete findings of fact and credibility determinations; (2) the administrative judge erred in holding the agency to a higher standard of proof than that required by regulations; and (3) the administrative judge erroneously considered evidence of the appellant's work performance in the position which the agency alleged she obtained as a result of her falsification.

The appellant has responded in opposition to the agency's petition for review, and contends that the agency's arguments consist of mere disagreement with the administrative judge's factual findings. The appellant therefore urges that the Board deny the agency's petition for review for failure to meet the regulatory criteria for granting review of an initial decision. The appellant, has not, however, challenged the administrative judge's determination that, although sanctions against the agency were warranted for its repeated failures to comply with orders and instructions regarding telephone conference calls and other prehearing matters, such sanctions were not

necessary to serve the ends of justice in this case. Nonetheless, because of the importance of this issue, we will consider the propriety of the agency's actions, and whether the administrative judge should have imposed sanctions on the agency for its actions.

ANALYSIS

The administrative judge abused his discretion in failing to impose sanctions on the agency for its failure to comply with his orders and an order from the administrative law judge.

Ordinarily, the imposition of sanctions is a matter within the administrative judge's sound discretion. Absent a showing that such discretion has been abused, the administrative judge's determination will not be found to constitute reversible error. See *Bilger v. Department of Justice*, 33 M.S.P.R. 602, 607 (1987), *aff'd* 847 F.2d 842 (Table) (Fed. Cir. 1988), citing *Felter v. Department of Transportation*, 16 M.S.P.R. 132, 134-35 (1983). However, the Board has not hesitated to impose sanctions where an administrative judge has failed to do so when an agency willfully and flagrantly disobeys a legitimate discovery order of the administrative judge. See *Fuller v. Department of the Treasury*, 10 M.S.P.R. 13, 15-16 (1982) (the administrative judge abused his discretion in adjudicating the appeal without imposing the appellant's requested sanction, where the agency failed to comply with a legitimate discovery order of the administrative judge); *Julson v. Office of Personnel Management*, 8 M.S.P.R. 178,

182 (1981) (the agency's failure to comply with the administrative judge's order to answer an interrogatory warranted the imposition of sanctions); *Stone v. Office of Personnel Management*, 5 M.S.P.R. 68, 70-71 (1981) (the agency's failure to comply with an order of the administrative judge to respond to the appellant's interrogatories, or to show cause why it could not respond, warranted the sanction of striking the agency's response to the appellant's petition for appeal, as well as all of its submissions).

In this appeal, the appellant requested, at the beginning of the hearing, that the administrative judge impose the sanction of striking the agency's response to her petition for appeal because of the agency's failure to comply with the administrative judge's orders, its failure to participate in discovery, its failure to comply with an order of the administrative law judge to respond to an interrogatory, and its "bad faith" in handling this proceeding. See Hearing Transcript (H.T.) at 14-16, 18. The administrative judge noted, both on the record and in the initial decision, that sanctions were warranted because of the agency's repeated failure to comply with Board orders, instructions regarding telephone conference calls, and other prehearing matters. See I.D. at 16 n.5; H.T. at 20. The administrative judge found, however, that sanctions were not necessary to serve the ends of justice. We find that the administrative judge abused his discretion in

finding that sanctions were not necessary to serve the ends of justice.

As set forth below, the record in this appeal is replete with instances of the agency's failure to comply in a timely fashion, or to comply at all with the administrative judge's prehearing orders and an order issued by the administrative law judge requiring it to respond to interrogatories. We find that the agency's flagrant disregard of the Board's prehearing orders and discovery orders denigrated the process of this appeal.²

By order dated July 2, 1987, the agency was informed that the administrative judge would conduct a pre-hearing telephone conference on August 19, 1987, at 10:00 a.m.³ In preparation for this conference, the parties were ordered,

² The administrative judge had to order the agency twice to respond to the appellant's petition for appeal. See Appeal File, Tabs 2, 4. When the agency did respond, it did not do so by the date designated by the administrative judge. In this regard, we note that on June 5, 1987, the agency was ordered to respond to the appellant's petition for appeal within twenty days of the date of the order. See Appeal File, Tab 2. On June 30, 1987, the agency was again ordered to respond to the appellant's petition for appeal within seven days of the date of the order, and to show cause as to why sanctions should not be imposed. See Appeal File, Tab 4. The agency submitted its response to the appellant's appeal by letter dated July 8, 1987. It did not respond to the administrative judge's order to show cause as to why sanctions should not be imposed. The agency did however request an extension of time for filing its response to the appellant's appeal until July 10, 1987. See Appeal File, Tab 7. The administrative judge subsequently granted the agency's motion for an extension of time. See Appeal File, Tab 12.

³ The parties subsequently agreed to change the date and time of this pre-hearing conference to August 20, 1987, at 2:00 p.m.

inter alia, to serve on each other and the Board no later than August 12, 1987, their position on each of the issues currently identified, the names of each witness who would testify, and the nature of their expected testimony.⁴ The agency, however, did not comply with this order. Further, the agency's representative was not available for the pre-hearing conference at the time designated, and when he became available, he indicated that he was not prepared for the conference. See Record of Conference Call dated August 20, 1987; Appeal File, Tab 12. The pre-hearing conference therefore had to be rescheduled. See *id.*

The agency was ordered to provide an appropriate hearing space, and to notify the administrative judge and all of the parties as to the exact location of the hearing. See Appeal File, Tab 6. The agency failed to make such arrangements. The arrangement for a hearing space was made by the administrative judge after he became aware that the agency had not done so. See H.T. at 19.

The agency also failed to comply with discovery orders. The agency was ordered by the administrative judge⁵ to produce documents that the appellant had requested--its rules, regulations, or guidelines used to code or rate the appellant's application--prior to the hearing. See Record

⁴ We note that the administrative judge provided the parties with sample responses to his order. See Appeal File, Tab 5.

⁵ The administrative judge overruled the agency's objection to the production of these documents. See Record of Conference call dated August 21, 1987; Appeal File, Tab 13.

of Conference Call dated August 21, 1987; Appeal File, Tab 13. The agency failed to produce these documents. As discussed above, the agency failed to respond to the appellant's interrogatory in which she requested information about the agency personnel who rated her application or to provide that individual as a witness. The agency also failed to make available an individual whom the appellant sought to depose. The administrative judge had previously informed the agency that it appeared that both persons whom the appellant wanted to depose had relevant testimony. See Record of Conference Call dated August 20, 1987; Appeal File, Tab 12. After agreeing to make arrangements for the deposition of one witness, the agency failed to do so and the appellant was unable to depose the individual. See H.T. at 10-13.

At the hearing, the appellant orally moved for imposition of sanctions against the agency based upon the agency's actions as detailed above. The appellant argued that the agency's failure to comply with the Board's orders made it difficult for her to have a fair and impartial hearing without all of the witnesses and documents available. See H.T. at 15. The appellant therefore requested that the administrative judge impose the sanction of striking the agency's documents from the file. *Id.* The administrative judge agreed that the agency's conduct in this proceeding warranted sanctions, but he deferred ruling on the motion. See H. T. at 20. The administrative judge

did not rule on the appellant's motion during the hearing, but held, in his initial decision, that the imposition of sanctions was unnecessary. See I.D. at 16 n.5. Under the circumstances of this case, we find that the administrative judge abused his discretion in failing to impose sanctions.

The agency's pattern of dilatory responses and repeated non-responses in this appeal constituted direct defiance of the administrative judge's and the administrative law judge's orders. The Board has held that "[i]t does not serve the 'ends of justice' to permit an agency to deny an appellant materials relevant to the development of his case, or to ignore an agency's direct disobedience of an administrative judge's proper order." *Fuller*, 10 M.S.P.R. at 16. Here, the agency denied the appellant access to materials and witnesses relevant to the development of her case, and disobeyed legitimate orders of both the administrative judge and the Board's administrative law judge. Therefore, the imposition of sanctions is necessary to serve the ends of justice in this case. As we have done in prior similar cases, we will impose the appropriate sanction. See *Fuller*, 10 M.S.P.R. at 16; *Julson*, 8 M.S.P.R. at 183; *Stone*, 5 M.S.P.R. at 71.

We agree with the appellant's contention that, in view of the agency's repeated failure to comply with proper orders, the appropriate sanction in this case is to strike the agency's response to the appellant's petition for appeal. See *Fuller v. Department of the Treasury*, 10

M.S.P.R. at 15-16. The effect of this sanction is to strike all of the agency's evidence submitted in support of its decision, thereby removing the evidentiary basis for the agency's action. As a result of the application of this sanction, the agency cannot meet its required burden of proof. 5 C.F.R. § 1201.56(a)(1)(ii).⁶ Accordingly, the Board finds that the agency's action directing the appellant's employing agency to remove the appellant from her position and barring her from competing for or accepting appointments in the Federal competitive service until February 28, 1989, cannot be sustained.

ORDER

Accordingly, the initial decision is AFFIRMED as MODIFIED by this Opinion and Order. The agency is ORDERED to cancel the directive to remove the appellant and to reverse its decision barring the appellant from competing for or accepting appointments in the Federal competitive service until February 28, 1989. This action must be accomplished within twenty days of the date of this decision.

The agency is ORDERED to inform the appellant of all actions being taken to comply with the Board's order and the date on which it believes it has fully complied. See 5 C.F.R. § 1201.181(b). The appellant is ORDERED to provide all necessary information requested by the agency in

⁶ In light of this finding, we need not address the merits of the agency's petition for review, because it would not effect the outcome of this case.

furtherance of compliance and should, if not notified, inquire as to the agency's progress from time to time. See *id.*

If, after being informed by the agency that it has complied with the Board's order, the appellant believes that there has not been full compliance, the appellant may file a petition for enforcement with the regional office within thirty days of the agency's notification of compliance. See 5 C.F.R. § 1201.182(a). The petition for enforcement shall contain specific reasons why the appellant believes there is noncompliance, and include the date and results of any communications with the agency with respect to compliance. See *id.*

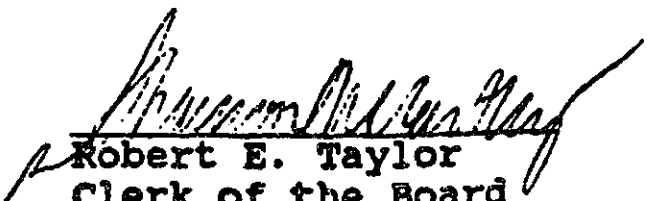
This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board